?BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

%DATED: 20.11.2018
(Reserved on 22.10.2018)

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THE HONOURABLE MRS.JUSTICE J.NISHA BANU

+W.P(MD)No.20408 of 2018
and
WMP(MD)No.18180 of 2018

#Ayans International Food
& Confectioneries Trading LLP,
Represented by its Managing
Partner Mr.Aqsar Poroli,
Door No.TP VII/674, Devathiyal,
Thenhippalam PO,
Mallappuram District,
Kerala 673 636. ... Petitioner

vs.

$1)The Commissioner of Customs,
Madurai~Harbour Express Road,
Periyanayagapuram,
Thoothukudi 628 008.
2)The Authorised Officer,
Food Safety and Standards Authority of India,
Ministry of Health and Family Welfare,
First Floor, CHD Building,
V.O.C. Port, New Harbour,
Tuticorin 628 004.
3)The Director (Imports)
Food Safety and Standards Authority of India,
Ministry of Health and Family Welfare,
FDA Bhawan near Bal Bhavan,
Kotla Road, New Delhi~110002.
4)The Chief Executive Officer,
Food Safety and Standards Authority of India,
Ministry of Health and Family Welfare,
FDA Bhawan near Bal Bhavan,
Kotla Road, New Delhi~110002. ... Respondents

Petition filed under Article 226 of the Constitution of India, to issue a Writ of Mandamus, to direct the second respondent to issue No Objection Certificate for the consignment covered under Bill of Entry bearing B.E.No.6431998 dated 18.05.2018 on the file of the 1st respondent after affixing label for the purpose of clearance of chocolates imported by the petitioner in 1730 carton boxes stuffed in Container No.TCNU 1580969 from the

port of Durres to the port of Tuticorin/India.

!For Petitioner : Mr.M.Abdul Nazeer
^For R1 : Mr.B.Vijay Karthikeyan
Senior Standing Counsel
For R2 to R4 : Mr.SU.Srinivasan

:ORDER
The prayer in this writ petition is to issue a writ of Mandamus directing the second respondent to issue NOC under the FSSAI Act, 2006 and the Regulations made there under for the cargo covered under the Bill of Entry No 6431998 dated 18.05.2018 in the file of the first respondent with a more specific direction to the second respondent to depute officers for affixing new labels by deleting the word ?compound? in the carton boxes and to mention ?contains vegetable oils in addition to cocoa butter? over the boxes of the consignment.

1. The petitioner has filed a Bill of Entry No 6431998 dated 18.05.2018 before the Tuticorin Customs through their Custom House Agent for import of Chocolates. They hold FSSAI Registration. The Bill of Entry covered 1730 carton boxes of imported Chocolates from M/s Kamila Chocolate, Republic of Kosovo.

2. Before Customs examination, the consignment was referred to the concerned Authorized Officer, FSSAI for issuing the NOC. The Inspection officer had inspected the cargo and filed his report. On the basis of the report, some queries were raised by FSSAI and the Petitioner submits that the same were duly replied. After one month and five days, the second respondent had sent a rejection report of Food Import vide their communication dated 23.06.2018 bearing signature dated 25.06.2018 to the Customs Department.

3. The Inspection report alleges that the application was made for 3 products while the imported cargo contained 25 products with different flavours. The rejection report recorded four findings as the basis of rejection.
(i)The Name mentioned in the cartons is compounded chocolates which is not a standard one as prescribed under regulation 2.7.4.4 of the Food Safety and Standards (Food Product Standards and Food Addictives) Fourth Amendment Regulations, 2017.
(ii) Contrary to Regulation 2.7.4.1 of the Food Safety and Standards (Food Product Standards and Food Addictives) Fourth Amendment Regulations, 2017, the product did not contain Coca Butter though it is named as chocolate.
(iii) Contrary to Regulation 2.7.4.6 of the Food Safety and Standards (Food Product Standards and Food Addictives) Fourth Amendment Regulations, 2017, the addition of vegetable fats is not mentioned in the label as required.
(iv) The ingredient Demineralized Whey powder mentioned in the label is not an ingredient mentioned in Regulation 2.7.4.1 of the Food Safety and

Standards (Food Product Standards and Food Addictives) Fourth Amendment Regulations, 2017 for chocolate.
Pointing out the above discrepancies, the consignment was rejected in terms of Sec 25 (1) (i) and Section 25 (1) (iii) of the Food Safety and Standards Act, 2006.

4. It was contended that the first review application was filed before the third respondent Director, FSSAI on 07.07.2018. The first review committee placed and examined the review application on 13.07.2018 and vide communication through mail dated 17.07.2018 rejected the cargo after confirming all four findings of the competent authority second respondent herein.

5. Aggrieved by the above order, the petitioner filed the second appeal before the CEO, FSSAI on 30.07.2018. In the second review, the petitioner contended that the chocolates are perishable in nature and as such require early clearance. It was submitted that the BOE should not be read in isolation and the documents submitted with the BOE should be read with the BOE and therefore the finding that the cargo contained 25 products instead of the three mentioned in the BOE is not correct. It was explained to the authority that the chocolates covered under the BOE confirms to the definition of chocolates contained in 2.7.4.4 of the Regulation ibid contrary to the findings in the rejection report of the second and third respondents. To substantiate their above claim regarding admissibility of standards under the FSS Act,2016 and the regulations there under, the content literature of the supplier were filed before the fourth respondent second review authority. It was specifically contended that the chocolates covered under the BOE falls in Regulation 2.7.4 (vii), that encapsulate the group ?filled chocolate? and therefore no barrier for import. It was also submitted that the product label has mentioned hydrogenized vegetable fats. Therefore the finding that the cargo did not contain the declaration of the addition of vegetable fats in the label is untenable. The petitioners had assured that they are willing to fix new labels in the event specifically required by the Authorities. It was also averred that there is discrepancies in the Regulations available in the FSSAI website and the Professional Book publishers relied by the authorities and therefore, the petitioner should be extended the benefit of doubt. It was also argued that the amendments came in 2017 and implemented only from 2018 and therefore minor discrepancies if any should be condoned. It was also pleaded that the petitioners incur huge amount in demurrages owing to the delay in clearance of the cargo. The petitioners are also aggrieved by the visual inspection that focuses on secondary packings and contended that discrepancies, if any, in secondary packings is curable. It was also averred that the chocolates are fresh and the authorities ought to have sent the samples for lab tests as the same are contemplated in the regulations to arrive at the freshness and fitness of the food for consumption. It was averred that the failure of the authorities to sent the samples for testing as contemplated under the regulations is violative of Article 14, 19 (i) and 21 of the Constitution of India. It was prayed that there is no deliberate omission on the part of the petitioner as the Food Import regulations were implemented only from November, 2015 and the Food Additive Regulations were implemented only from February, 2018.

6. In the second review application filed before the fourth respondent, the apex committee examined the review application on 08.08.2018 and the application was rejected on two grounds vide mail communication dated 10.08.2018.
(i) The name of the products ?compound chocolates? as mentioned in the carton boxes do not conform to chocolates as mentioned in Regulation 2.7.4 of Food Safety and Standards (Food Product Standards and Food Addictives) Regulations, 2011.
(ii) Further as per the label description and ingredients list, the products contained hydrogenated vegetable oils which are not permitted under Regulation 2.7.4 of Food Safety and Standards (Food Product Standards and Food Addictives) Regulations, 2011.
Accordingly, two out of the four contraries/objections found by the lower authorities were set aside and the rejection is based on the above two grounds of the fourth respondent second review authority. In other words, the presence of demineralised whey powder and the absence of Cocoa butter in the chocolates raised as contraries were dropped and the same found to be in order.

7. The petitioners assail that the objection (i) of the fourth respondent is on an improper understanding of the definition of chocolates under the regulation and the objection (ii) is harsh in as much as one time relaxation is not given to the petitioners as they had done in other cases.

8. The respondents on the other hand submit that the product description in the application for FSSAI clearance was mentioned as ?chocolates? whereas in the cartons they are mentioned as ?compounded chocolates?. It was submitted that the number of products mentioned in the BOE is 3 whereas the annexed documents indicated that there were 25 products with different flavour and colours. It was also submitted that the products contained vegetable fats but the label did not contain the statutory mentioning ?Contains vegetable oils in addition to cocoa butter?. It was averred that allowing the petitioners to re~label the cartons as ?Chocolates? instead of the original ?Compound Chocolates? is violative of Regulation 2.2.1.3 Food Safety and Standards (Food Product Standards and Food Addictives) Regulations, 2011. It was also submitted that relabeling on imported goods is allowed only in rectifiable labelling deficiencies. It was specifically contended that allowing the same in the case of the petitioner will deceive/hoodwink the customer.

9. It was submitted by the respondents that sampling as sought by the petitioner can be done only upon the satisfaction of the Authorized officer regarding compliance of FSS (Packing and Labelling) Regulations, 2011 by visual inspection and attention was drawn to Regulation 6.10 of FSS (Packing and Labelling) Regulations, 2011. It was submitted that the delays mentioned in the affidavit of the petitioner is incorrect as the CHA was notified periodically online and corrective clarifications filed were taken on record then and there and as such the delay is at the hands of their agent. Reliance was placed on the decision of the Hon?ble High Court of Calcutta in the case of FSSAI vs Heartland Trading Co Private Limited & others.

10. Heard the counsels for both parties. The petitioners had imported 1730 cartons of chocolates and filed Bill of Entry No 6431998 dated 18.05.2018 with Tuticorin Customs for clearance of the same. The import involved food products and therefore the same was referred to FSSAI by customs for issue of NOC. The FSSAI raised certain queries and the same was addressed by the petitioners. Thereafter inspection was conducted and the second respondent rejected the import consignment on four contraries/objections. The petitioner filed review with the first appellate authority. The objections were sustained. The petitioner preferred second appeal. The second review authority had rejected the import consignment on the basis of two objections.

(i) The name of the products ?compound chocolates? as mentioned in the carton boxes do not conform to chocolates as mentioned in Regulation 2.7.4 of Food Safety and Standards (Food Product Standards and Food Addictives) Regulations, 2011.

(ii) Further as per the label description and ingredients list, the products contained hydrogenated vegetable oils which are not permitted under Regulation 2.7.4 of Food Safety and Standards (Food Product Standards and Food Addictives) Regulations, 2011.

The other two objections of the respondents 2 and 3 were not sustained.

11. The first objection was that the carton boxes contained product description as ?Compound chocolates? instead of ?chocolates? and that ?compound chocolates? do not find mention in the standards prescribed in Regulation 2.7.4 of Food Safety and Standards (Food Product Standards and Food Addictives) Regulations, 2011. Therefore, the respondents thought it failed the visual inspection contemplated under the statutes for issue of NOC for clearance. It was vaguely argued on behalf of the respondents that such a description will deceive/hoodwink the consumers. It is not explained how the product description in the carton boxes will deceive/hoodwink the consumer. The petitioner on the other hand contends that the products viz. filled chocolates find mention in Regulation 2.7.4 (vii) of Food Safety and Standards (Food Product Standards and Food Addictives) Fourth Amendment Regulations, 2017. This specific submission was not assailed by the respondents. The petitioner would aver that there is no intention for having the specific description in carton boxes which are merely secondary packing for safe transportation of the cargo and are willing to re~label it as ?Chocolates? at the CFS before clearance if insisted by the respondents. I have carefully considered the objection and the counter. In my view, the disagreement can be at best interpreted as not strictly followed. By no stretch of imagination, it can be claimed that the mentioning of the product description as ?compound chocolates? is in any way aimed at deceiving/hoodwinking the consumers. In fact the consignment fall under the group ?filled chocolates? and the same was not disputed. The Also the petitioner is willing to re~label the cartons as mere ?chocolates?. The description ?chocolate? is a very generic term under the FSS Regulations. It recognizes the many sub classifications of chocolates. Therefore, I am convinced that the respondents have failed to make out a case to conclude that the choice of nomenclature defies the standards mandated under the FSS Act, 2006 and the Regulations made there under. Accordingly, I do not hesitate to hold that the strict labelling requirement in respect of objection 1 in the second review order, even if it is there, is curable.

12. The second objection is that as per the label description and ingredients list the product contained hydrogenated vegetable oil which is not permitted under the Food Safety and Standards (Food Product Standards and Food Addictives) Regulations, 2011. Interestingly, the objection of the original authority read as
?Contrary to Regulation 2.7.4.6 of the Food Safety and Standards (Food Product Standards and Food Addictives) Fourth Amendment Regulations, 2017, the addition of vegetable fats is not mentioned in the label as required.?

13. Contrary findings are recorded by the original and review authority regarding this objection. The petitioner contends that the vegetable fat is extracted from cocoa beans, which is also called cocoa butter or therobra oil and the same permissible under (Food Product Standards and Food Addictives) Fourth Amendment Regulations, 2017. Therefore, they are willing to affix labels mentioning the presence of vegetable fats in if required under the FSS (Packing and Labelling) Regulations, 2011.

14. Interestingly, the imported chocolates has not been tested. Only visual examination was conducted. Apparently, the presence and absence of ingredients and compliance requirements were discussed by all the parties only on the basis of the declarations of the petitioner. Therefore, in my opinion, the sum and substance of the objection is that the petitioner mentioning the product description as ?Chocolates? and mentioning ?contains vegetable fat in addition to cocoa butter? in the cartons would comply with the statutory requirements for clearance of the subject goods under the FSS Act, 2006 and the regulations made thereunder.
15. In view of the above, ends of justice would be met if the respondents are directed to allow the petitioners to affix suitable labels to cure the above mentioned contraries raised in the two objections and issue necessary NOC upon affixing the labels so required by the respondents within two weeks time.
The Writ Petition allowed on the above terms. No costs. Consequently, connected miscellaneous petition is closed.

To

1)The Commissioner of Customs,
Madurai~Harbour Express Road,
Periyanayagapuram,
Thoothukudi 628 008.
2)The Authorised Officer,
Food Safety and Standards Authority of India,
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First Floor, CHD Building,
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Tuticorin~628 004.
3)The Director (Imports)
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